THE TARIFF AND THE ENGLISH LANGUAGE

BY MARTIN T. BALDWIN

A TARIFF act is a verbal wood-pile, harboring many a dark ambiguity. The clearing of its obscurities is not only an interesting intellectual and legal problem, but is also at times a matter of great financial and industrial importance. A single phrase may mean millions,—as is illustrated by one rather recent case in the Supreme Court, where revenue to the amount of fifteen million dollars was found to depend upon the interpretation of one short phrase, whose meaning was presumably clear to the members of Congress, but was not quite so clear to the rest of the world.

An official of the Treasury Department, grown gray in the Customs service, tells the story of how he was once called into conference with an eminent committeeman of Congress, to lend a hand in the shaping of a tariff bill then under way. One of the bill's provisions over which they were working caught his attention. "Senator", he said, "the wording of this paragraph is likely to be misunderstood. I am afraid the courts will give it a meaning different from yours". To which the legislator replied, —"Well, never mind the courts. Congress is making this law and we know what it means. That ought to be enough." And so the paragraph was left as written, to the chagrin of the onlooker, who in due time saw the bill enacted into law, saw the supposedly unambiguous provision questioned by a doubting importer, and eventually saw a court of law give it an interpretation exactly the opposite of that really intended by its writer.

Now it is an accepted maxim of customs law that in interpreting a tariff act the sole aim of the court is to ascertain the true intent of Congress. And so the Senator, if he ever saw this ruling of the court upsetting his plan, and if by chance he still retained some residuum of interest in the subject, might have

been tempted cynically to recall the "true intent" maxim, and to wonder what in the world was the trouble anyhow.

As a matter of fact, the trouble in all probability lay with the legislator himself rather than with the court,—not with the Senator as an individual, but with his legislative job and its inherent difficulties, as generally handled. In the first place, there is of course that fundamental difficulty common to all users of words, barring only the masters of literature, which makes it impossible at times for one to see his own ambiguities of diction, to avoid ellipses of thought or word, to realize the ignorance of others as to facts and purposes which he himself understands but which he may fail to explain,—in other words, to read himself as others read him.

Then there is the added difficulty, especially found in tariff writing, caused by the very scope and complexity of the subject itself, which make it impossible to see everything and to describe everything. A tariff act is supposed to make dutiable, or free, every known article of commerce, from the crudest to the most highly manufactured. Over six hundred numbered paragraphs, many of them long and complicated, running in their course all the way from acids to zaffer, testify to the gallant effort in our latest tariff act to cover the whole ground and so to vary the rates of duty as to satisfy everybody.

Yet ten times that number of paragraphs would not be enough to segregate all the wares of our markets,—witness the inventory of a modern department store. So even in a six-hundred-paragraph tariff bill, generalizations and abbreviations are in order, with inevitable ambiguity. Who can say, for example, when Congress enacts a provision for "bricks", whether or not the intention is to include every conceivable article that is known as a brick? How about so-called "scouring bricks", which are used, not for the building of houses or of fireplaces, but for the polishing of marble? When that question arose some years ago the customs officials insisted on collecting duty upon scouring bricks on a higher basis than that of mere bricks. But the importers, availing themselves of the usual machinery for the interpretation of Congressional English, demanded through the courts a return of the excessive duty, and it was only after a

prolonged legal battle that the court of last resort finally held that a scouring brick was not a brick. Similar questions are common enough. Is ginger bread dutiable as "bread"? Does the term "pears" include alligator pears? Or, to use other historical examples, is a currycomb a "comb", a rubber sponge a "sponge", or is acetone oil an "oil"? Are phonograph needles dutiable as "needles", and if so, how about Cleopatra's needle? Nor are these questions at all frivolous. The life of a whole industry may perhaps depend upon the elucidation of one of these little ambiguities.

And how very difficult it is to get punctuation and grammar correct, so as to make everything plain! Even the lowly comma is hard to handle. The tariff act of 1913, under which the United States is now doing business, contains in the Metal Schedule a provision for the levy of duty upon "antimony oxide, salts, and compounds of". While the bill was pending in turn before the Ways and Means Committee, the Finance Committee, the two houses of Congress, and the Conference Committee, this particular provision was given five successive forms, no two alike, and each differing from the others in practically nothing but the arrangement of the commas. (Possibly careless proof-reading had something to do with that.) And when it was all finished, and enacted into law, what did it mean? Did it or did it not levy a duty on "antimony oxide", which is a well known article of commerce? The court held not, though with some hesitation. Did the punctuation permit it to cover salts of "antimony", or was it confined to salts of "antimony oxide"? Here again there was uncertainty, and not everyone is satisfied even now on that point. Yet the members of the Conference Committee, who had the last word in the arrangement of that provision, presumably saw no ambiguity whatever in its wording and felt sure they knew just what it meant; otherwise they would not have adopted it.

Trouble of another type frequently occurs. A series of articles is named, and then there follows a qualifying expression of some sort. For example, a duty is laid upon "penknives, pocket knives, erasers, manicure knives, and all knives which have folding blades". This brings up the question: Does the requisite

of "folding blades" refer back to the erasers, so as to limit them to those having folding blades, or is the word "erasers" unlimited, and free to include rigid blade erasers? Or consider the provision for "opera and field glasses, optical instruments and frames and mountings for the same". Does the expression "mountings for the same" refer back to the opera glasses and field glasses, or is it confined to mountings for frames, or to mountings for optical instruments? As a matter of fact, it was finally held that in the opera glass paragraph the qualifying phrase related back to all that preceded it, while in the knife paragraph the effect of the analogous phrase was limited to its immediate antecedent. But it would be pretty hard for an outsider, not familiar with the history and surrounding circumstances of the enactments, to predict the court's solution in either case.

Another pitfall is found in the various provisions in which articles are named and classified according to the materials of which they are composed; the material is often named, but without any statement as to the quantity that must be present, —that is, as to whether or not the article must consist wholly, or in chief value, of that material, or whether the provision covers an article made only in minor part of that material. At times the administrating officer, or the judge, must needs be good at guessing. Of course the context and the previous history of the subject are of help, but results apparently quite inconsistent are sometimes reached, as is shown by the decisions holding that "cotton cloth" must be composed wholly of cotton, while "metal buttons" and "shoes made of leather" may contain substantial components other than the mere metal or leather.

Still another common source of misunderstanding in tariff acts is found in provisions such as the one contained in the Payne-Aldrich bill of 1909, imposing a certain rate of duty on "cans, boxes, packages, and other containers of all kinds", when composed of metal. An importation was made of small metal banks, toys for children, and classification under that provision was claimed. They were unquestionably "containers". But were they the sort of containers referred to there by Congress? Eventually it was held they were not, since they were not intended for use in the shipment of merchandise, and so were not *ejusdem*

generis with "cans, boxes, and packages", which ordinarily are so used. In the same way, the question has arisen whether a provision for "castings of iron which have been chiseled, drilled, machined, or otherwise advanced in condition" includes castings advanced in condition through a mere process of nickel plating; likewise whether a provision for "blacking, polishing powders, and all preparations for cleaning or polishing" was intended to cover a toilet powder used for polishing one's finger nails. In both these cases the answer was in the negative. Words, like men, are known by the company they keep. Until the character of their associates is known and considered their own status is hard to fix.

One of the chief difficulties which stands in the way of a clear expression by Congress of its intentions is the fact that bills are not prepared for enactment by the Congress, but by the Congressmen. Tariff schedules are long and complicated. The work is subdivided. The right hand of Congress does not always know what its left hand is doing. The subcommittee that prepares the wool schedule may not know, or care, much about the work on the silk schedule. As a result, the overlapping of provisions is very common, and one of the most frequent jobs of the judiciary is the unravelling of conflicting provisions, to determine which of the competing paragraphs shall prevail. Changes which in one place seem innocent and trivial have at times most important and unexpected results in parts of the act that seemed quite remote,—as for instance a recent change in the provision for upholstery goods, which, by merely lowering the permissible weight of such goods, reached out into another part of the tariff act and seized upon a great class of lace goods, thus depriving the Government of many thousands of dollars of revenue. If some one member of Congress, endowed with the knowledge of all, could inscribe the whole tariff bill at his leisure, we might then have a model of unity and consistency at least.

Yet mere coöperation or unification of effort, with all the care in the world to avoid verbal traps and hidden ambiguities, will not produce a fool-proof tariff act, unless due consideration be given to one other source of difficulty that is peculiarly important in the preparation of such bills. This lies in the fact that the builders

of the tariff are dealing almost altogether with what may be called second-hand materials. Practically every adjective, every noun, every phrase, employed in the structure has been used already in some preceding tariff act, and has been construed and applied by the administrative officials or by the courts, sometimes with quite unexpected results. Moreover, its language, especially in the terms used for describing particular kinds of merchandise, is the language of merchants, of wholesale buyers and sellers, which has through years of trade acquired meanings not always intelligible to the layman. But the legislator is not at liberty to disregard this tariff and commercial history. He may not handle his words as new material, right out of the dictionary. He must investigate the origin and previous employment of all his verbal planks and beams, and make use of them accordingly.

For example, to use a rather homely illustration, if he wants a certain rate of duty to be levied upon women's hairpins, it will not do to provide simply for "pins" in general, upon the assumption that this word includes all sorts of pins. For research will disclose that in a former tariff act Congress at one time provided, not only for "pins", but also, in a separate paragraph at a separate rate of duty, for "hairpins". Which fact was held by the courts to amount to a legislative differentiation between hairpins and pins, so that a hairpin is no longer to be regarded as a form of pin at all, in tariff parlance, but is assigned to a class by itself. Thus, in a new tariff act, if hairpins are to receive any special consideration, they must be specially named, as before. Nor will recourse to the dictionaries or to the rules of logic be of any avail, for the Supreme Court of the United States has itself recognised this identical hairpin distinction.

In the same way, one must become familiar with, and reconciled to, the fact that various tariff acts have already by their differentiations and discriminations indicated that beaded necklaces are not jewelry, that paste is not glass, that porcelain is not earthenware, that ribbons are not trimmings, that banjo strings are not parts of musical instruments, and that various other things are not what they would naturally seem to be.

As with statutory definitions and distinctions, so also with

judicial interpretations. When Congress makes use of words or phrases whose meaning has already been construed by the courts, there is a legal presumption—rather violent at times, it is true—that Congress is familiar with the court's interpretation, and so adopts it as its own, unless some means is taken to show a different understanding. One may not understand, offhand, why mackerel packed in ice is necessarily ineligible to classification as "fresh fish"; nor is it perfectly clear why fish roe may not be dutiable as "fish", especially in view of the fact that *pâté de foie gras* is considered a form of "poultry, prepared". But so it is, under the court decisions, and the words "fish" and "poultry" must therefore be used with discretion in framing a new act.

Nor is the shadow of the past cast only by the courts. It sometimes happens that for years the administrative officers of the Government will place upon the statute an interpretation which never passes through the test of litigation. It may be favorable to the importers, it may be adverse, it may be of doubtful correctness, but if this interpretation has crystallized through a long course of years it is entitled to recognition; it is presumptively accepted by Congress if the same statutory provision is reënacted, without change or explanation. Of course the departmental interpreter will not knowingly be permitted to amend the law, or to construe it in ways that are plainly illegal; but the field of legitimate ambiguity is wide, with plenty of room for honest difference of opinion. There is no guaranty that the established practice is right or just,—but it is established, and so is presumably valid.

Tariff laws, besides being producers of revenue, are regulators of commerce. Their language therefore is not that of literature, of the laboratory or the factory, but is rather the language of commerce, of the buyers and sellers of merchandise. This was decided nearly a hundred years ago by Justice Story, who observed that the legislature "did not suppose our merchants to be naturalists, or geologists or botanists", but "applied its attention to the description of articles, as they derived their appellations in our own markets". And so he held that an article known in trade as "bohea tea" was entitled to be classi-

fied under the tariff provision for "bohea tea", even though it was in fact an inferior kind of tea, not strictly and scientifically entitled to be given that particular name.

Instances of this form of commercial limitation upon, or extension of, the common meanings of words are often encountered. A narrow textile fabric classified by the wholesale trade as a "featherstitch braid" becomes dutiable as a "braid", even though it is not braided at all, but is in fact made on a loom, rather than on a braiding-machine; skins of ponies become in the same way dutiable as "furs", and imitation pearls as "precious stones"; while the trade practice serves to exclude from the statutory provision for "machine tools" various tools that might, as a matter of common understanding, quite well be included. The situation has its analogy in the ordinary restaurant bill of fare, where fried flounder has to be ordered as "filet of sole" in spite of private misgivings. Nor can the guest make much headway in ordering a dinner unless he understands and follows the ancient customs of the restaurant business.

On the whole, the task of Congress in adjusting its words to its ideas in a tariff act is considerably more complicated than is commonly supposed. Problems of political economy, of international comity, of protection, of revenue, are by no means the sole cause of worry. It seems like a comparatively simple matter, once the economic problems are disposed of, to write down a list of the articles subject to importation, each with its appropriate rate of duty fixed in accord with the principles adopted. But there is good reason to believe that the latter undertaking is fully as worrisome and time-consuming for the average Congressman as is the more serious work of determining economic policies. At any rate, as the members swelter and struggle through the summer of 1921, as they very likely may, revising the tariff for the four or more years to come, they will be regarded most of all with sympathy by those who understand, not only the spectacular problems visible to the public, but also the humdrum difficulties involved in putting the real intent of Congress into plain and workable English.

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